In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 926

BETHLEHEM STEEL CO., ET AL., PETITIONERS

v.

UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The facts of this case are undisputed. Petitioners desired to rebuild ("jumboize") outmoded tankers into large ore carriers by replacing their midsections with larger ones manufactured in European shipyards. Because Section 27 of the Merchant Marine Act of 1920 (41 Stat. 999, as amended, 46 U.S.C. 883) permits only "a vessel built in and documented under the laws of the United States" to engage in the coastwise trade and (until its 1960 amendment, not applicable here) denied the privilege to vessels

"rebuilt outside the United States," [1] one of the petitioners sought a ruling from the Bureau of Customs (in its capacity as administrator of the cabotage laws) that the rebuilt tankers would be eligible to engage in domestic trade. On the basis of its finding that a midsection is not itself a vessel, the Bureau ruled that the jumboized tankers would not be considered "rebuilt outside the United States." [2]

Petitioners subsequently had two midsections manufactured to their specifications in Europe. All of the piping, electrical wiring and apparatus, and ballast tanks required in the center section of a rebuilt

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[1] Section 27 of the Act as then in effect, 46 U.S.C. (1958 edition) 883, provided in pertinent part: "no vessel of more than five hundred gross tons which has acquired the lawful right to engage in the coastwide trade, either by virtue of having been built in or documented under the laws of the United States, and which has later been rebuilt outside the United States, its Territories (not including trust territories), or its possessions shall have the right thereafter to engage in the coastwise trade * * *." In 1960, Section 27 was amended to provide in part: "no vessel of more than five hundred gross tons which has acquired the lawful right to engage in the coastwise trade, by virtue of having been built in or documented under the laws of the United States, and which has later been rebuilt, shall have the right thereafter to engage in the coastwise trade, *unless the entire rebuilding, including the construction of any major components of the hull or superstructure of the vessel, is effected within the United States,* its Territories (not including trust territories), or its possessions * * *." 74 Stat. 321, 46 U.S.C. 883 (emphasis added).

[2] The ruling of the Bureau of Customs is not formally reported. It is, however, published in the House Committee report on the 1960 amendment to 46 U.S.C. 883. H. Rep. No. 1887, 86th Cong., 2d Sess., pp. 2-3.

tanker were incorporated in the midsections. The midbodies were then towed to the United States where petitioners used them to jumboize two tankers.[3] The rebuilt vessels were sold for use as self-propelled ore carriers on the Great Lakes and documented as vessels entitled to engage in the coastwise trade.

Upon entry of the midbodies into the United States, the Collector of Customs levied duty on them under Paragraph 397 of the Tariff Act of 1930, 19 U.S.C. (1958 edition) 1001, Para. 397, as modified by the Torquay Protocol to the General Agreement on Tariffs and Trade, 91 Treas. Dec. 150, T.D. 54108.[4] Petitioners protested, claiming the midsections were vessels and, as such, were, under the decision in *The Conqueror*, 166 U.S. 110, subject to no duty. The Customs Court sustained the protest, holding that the midbodies were vessels within the general definitions of the word contained in 1 U.S.C. 3 and 19 U.S.C. 1401(a),[5] and were therefore duty-free under *The Conqueror*.

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[3] To enable the midbodies to be towed across the Atlantic, temporary bows were affixed to the forward ends of their hulls and their sterns were reinforced.

[4] Paragraph 397 encompasses "[a]rticles or wares not specially provided for, whether partly or wholly manufactured * * * [c]omposed wholly or in chief value of iron, steel, * * * [etc.]."

[5] 1 U.S.C. 3, which is virtually identical to 19 U.S.C. 1401 (a), provides: "The word 'vessel' includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." 1 U.S.C. 3 is a general definition, not intended to be specifically applicable in the customs field. 19 U.S.C. 1401(a) is a defi-

The Court of Customs and Patent Appeals reversed, holding that the midbodies were not vessels and that duty was properly assessed (Pet. App. B). The court found (Pet. App. 33a):

> All of the evidence of record establishes that the midsections, at the time of importation, were not watercraft designed or intended as a means of transportation on water. Their sole resemblance to craft that have been held to be vessels (barges) and their qualification under a literal reading of the definitions advanced as vessels stems from the fact that temporary fore and aft sections were constructed for the tow across the ocean *to make possible their designed and intended use as midsections and not means of transportation.* [Emphasis in original.]

The decision below is clearly correct, is not in conflict with the decision of any other court, and has little (if any) prospective importance. Further review, therefore, is unwarranted.

1. It is uncontradicted that the midbodies were constructed not as barges or any other type of watercraft but solely as the center sections of tankers. Affixing temporary bows and placing stiffening at their sterns to make possible their being towed across the ocean did not convert them into vessels. That a midbody might be, in the words of 1 U.S.C. 3, "used, or capable of being used, as a means of transportation on water" is not controlling as to whether it is a vessel for customs purposes. Many objects that are

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nition for use in conjunction with a portion of the customs laws that is not involved in this case.

literally within the definition are plainly not "vessels." For example, a large wooden watertight packing crate would be "capable of being used as a means of transportation on water," but no one, we believe, would suggest it be accorded duty-free entry as a vessel.[6]

2. Even were the midbodies "vessels" they would be subject to customs duty.[7] Congress has not provided that *any* object which meets some definition of the word vessel must be accorded duty-free entry. The leading case on the exemption of vessels from duty—*The Conqueror*, 166 U.S. 110—certainly did not attribute to Congress a purpose to exempt from duties all objects that float and are physically capable of transporting persons or cargo. In holding the yacht in that case entitled to duty-free entry the Court cited three factors: *first*, vessels traditionally

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[6] Petitioners' suggestion of a conflict (Pet. 8, 11) between the decision below and the decisions in *The International*, 89 Fed. 484 (C.A. 3), *Thornley & Pitt* v. *United States*, 18 C.C.P.A. (Customs) 265, and *Hitner Sons Co.* v. *United States*, 13 Ct. Cust. App. 216, is without merit. The dredge and scows in *The International* and the yachts in *Thornley & Pitt* were plainly vessels within the traditional meaning of the word, and were intended to be used as vessels; in *Hitner Sons* the court held *dutiable* the ruins of a vessel shown to be fit only for scrap or junk. Petitioners' further suggestion that the decision below is in conflict with a number of decisions outside the customs field (Pet. 9-11) is wide of the mark. The decision that midsections are not vessels for customs purposes is entirely consistent with cases holding a variety of floating objects to be vessels within the meaning of other statutes having wholly different purposes.

[7] Because of its finding that the midbodies were not vessels, the court below did not reach this point.

are not "imported or taken into the country in the ordinary sense in which that term is used with reference to other articles" since they do not "become commingled with the general mass of property" (*id.*, at 115); *second*, vessels are not brought to the United States to "become the subject of sale and commerce within the country" but rather come to our shores as the vehicles of dutiable articles which become the subject of sale and commerce (*ibid.*); and *third*, from the beginning of the Republic, Congress had by statute subjected "all ships or vessels entered in the United States" to tonnage duties but had made no mention of "ships or vessels" in the tariff laws (*id.*, at 118). None of these factors is applicable to the present case.

Petitioners' sole purpose in bringing the midbodies to the United States was to use them in place of American-made midbodies in rebuilding vessels for sale here. The midbodies thus were "commingled with the general mass of property" and were "the subject of sale and commerce" here. Moreover, the midbodies were not subjected to tonnage duties upon their arrival in the United States. Whether *capable* of being used to transport persons or cargo, the fact is that unlike THE CONQUEROR or cargo ships which come to our shores in the sole capacity of transporters of dutiable articles each midsection was brought to the United States by a shipbuilding concern for a clear domestic commercial purpose—use in rebuilding a ship for sale to a shipping company at an anticipated profit. Doubtless the reason for using these foreign-built midsections rather than American-

made products was to obtain cost savings—the factor that influences most importations. In these circumstances, it could not have been the congressional intent that midbodies (even if they were to be deemed "vessels"), utilized in the domestic shipbuilding industry in lieu of American-made products, be free of duty.

3. To accord the midbodies duty-free status would frustrate a considered policy of the Bureau of Customs, the government agency charged with administering the nation's cabotage laws. As mentioned (*supra*, p. 2), at the request of one of the petitioners the Bureau ruled that vessels rebuilt with foreign-made midsections would not lose their privilege to engage in the coastwise trade. That decision was primarily influenced by the Bureau's finding that a midbody could not itself be considered a vessel because it was not intended to be used as one. Petitioners have reaped the benefits of the Bureau of Customs' ruling by selling the rebuilt tankers as vessels entitled to engage in the coastwise trade; they should not now be permitted to avoid the corollary—that the midsections are subject to duty under the Tariff Act of 1930.

4. The question whether midbodies are dutiable under the Tariff Act has little prospective importance. Since the 1960 amendment to Section 27 of the Merchant Marine Act (see p. 2, n. 1, *supra*), vessels rebuilt with foreign-made midsections may not engage in the coastwise trade. Thus the major factor which influenced the importation of foreign mid-

sections to our shores—to rebuild tankers at a lower cost but not to lose the vessels' coastwise trade privileges—no longer exists. Petitioners' suggestion (Pet. 14) that midbodies may nevertheless still be imported is wholly unrealistic. Petitioners rebuilt their tankers in the United States only to avoid losing the vessels' coastwise trade privileges; the cost of jumboizing a vessel in an American shipyard with a foreign-made midbody would undoubtedly far exceed the cost of sailing the vessel to a foreign shipyard and rebuilding it there. Morever, while an American flag vessel rebuilt with a foreign midsection would still be entitled to engage in foreign trade, it would almost certainly not receive the subsidies which make it profitable to operate a merchant vessel under the United States flag or to rebuild such a vessel.[8]

Furthermore, the Tariff Schedules of the United States, in effect since August 31, 1963, contain a specific provision assessing duty on "floating structures."[9] The Bureau of Customs has ruled that midsections are dutiable under that provision.

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[8] While operating and reconstruction subsidies are not *per se* denied vessels rebuilt outside the United States, the statutes governing the award of those subsidies require that "so far as practicable" (in the case of reconstruction subsidies) or "whenever practicable" (in the case of operating subsidies) only articles, materials, and supplies grown, produced, or manufactured in the United States shall be used in the subsidized vessels. 46 U.S.C. 1155(a), 1176(7). Since only limited funds are available for these subsidies, it is highly doubtful they would be paid to a shipowner who rebuilt his vessel using a foreign-made midsection.

[9] See Tariff Schedules of the United States, 19 U.S.C. 1202, Item 696.60.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1967.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1967 244749 578